IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Case No. 05-CV-00329-TCK-SAJ**
	)	
TYSON FOODS, INC., et al.,	)	
	)	
Defendants.	)	

STATE OF OKLAHOMA'S RESPONSE TO "SUPPLEMENTAL BRIEF IN SUPPORT OF DEFENDANT COBB-VANTRESS, INC.'S FIRST MOTION TO COMPEL"

COMES NOW the Plaintiff, the State of Oklahoma, ex rel. W.A. Drew Edmondson, in his capacity as Attorney General of the State of Oklahoma, and Oklahoma Secretary of the Environment, C. Miles Tolbert, in his capacity as the Trustee for Natural Resources for the State of Oklahoma under CERCLA, ("the State"),[1] by and through counsel, and responds to the "Supplemental Brief in Support of Defendant Cobb-Vantress, Inc.'s First Motion to Compel" ("Supplemental Brief") [DKT #947][2] as follows:

The stated basis of Cobb-Vantress's First Motion to Compel was "whether Cobb-Vantress, a defendant in this case, will be permitted to discover the results of Plaintiffs' environmental sampling in the IRW" -- sampling which the State is claiming is protected from discovery on the basis of a work product claim. *See* First Motion to Compel, p. 2 [DKT # 743]. None of the purported "[r]ecent events, including Supplemental Rule 26(a) Disclosures by

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[1] In its Supplemental Brief, Cobb-Vantress states that the plaintiff in this action is Attorney General W.A. Drew Edmondson. *See* Supp. Br, p.1 fn. 1. Cobb-Vantress is wrong. The State of Oklahoma is the plaintiff in this action. Cobb-Vantress's efforts to personalize this lawsuit are inappropriate.

[2] Notably, Cobb-Vantress's twelve (12) page Supplemental Brief exceeds the ten (10) page limitation for such briefs imposed by LCvR7.1(h).

Plaintiff," *see* Supp. Br., p. 1, inform the inquiry of whether the State is required under Fed. R. Civ. P. 26(a)(1)(B) to disclose work product material prior to a decision being made as to whether that work product material will used by a testifying expert. Simply put, Cobb-Vantress's Supplemental Brief goes far afield of the issue raised in Cobb-Vantress's Motion to Compel. Indeed, not only is it irrelevant to the issues raised by the Motion to Compel, but also the Supplemental Brief is filled with improper and unfounded assertions, allegations and characterizations.[3]

I. ARGUMENT

A. The Supplemental Brief Provides No Assistance in Resolving the Matters Placed before the Court by Cobb-Vantress's Motion to Compel

1. The State has fully complied with the Federal Rules

The State's Supplemental Rule 26(a) Disclosure in no way impacts the determination of whether the State's environmental sampling information being withheld on the basis of a work product claim is discoverable. In regard to initial disclosures, Rule 26(a)(1)(B) states that a party must provide to the other parties without awaiting a discovery request:

> a copy of, or a description by category and location of, all documents, data compilations, and tangible things, that are in the possession, custody, or control of the party and that the disclosing party may use to support its claims or defenses, unless solely for impeachment.

Fed. R. Civ. P. 26(a)(1)(B) (emphasis added). The State's Supplemental Disclosure does what is required by the rule, *i.e.,* it sets forth a description by category of materials the State may use to

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[3] Indeed, on at least three occasions in its Supplemental Brief, Cobb-Vantress makes reference to Rule 11. There is absolutely no basis for raising Rule 11 with respect to the State's case. As the court in *Greely Publishing Co. v. Hergert* admonished, "[c]ounsel are reminded that Rule 11 should never be used as a litigation tactic." 233 F.R.D. 607, 612 (D. Colo. 2006) (citation omitted); *see also Rateree v. Rockett*, 630 F.Supp. 763, 778 n. 26 (N.D. Ill. 1986) ("an improper Rule 11 motion may well call into play the well known legal proposition that people who live in glass houses shouldn't throw stones").

support its claims.[4] The mere disclosure of descriptions of the categories of materials the State may use to support its claims, however, does not make the materials that fall within the described categories automatically discoverable. *See* Advisory Committee Notes to 1993 Amendments to Rule 26 ("The disclosing party does not, by describing documents under subparagraph (B), waive its right to object to production on the basis of privilege or work product protection, or to assert that the documents are not sufficiently relevant to justify the burden or expense of production") (emphasis added).

Cobb-Vantress has not cited a single case in its Supplemental Brief supporting the proposition that Fed. R. Civ. P. 26(a)(1)(B) mandates the disclosure of work product material prior to a decision being made as to whether that work product material will be used by a testifying expert. In fact, *United States v. Dentsply International, Inc.*, 2000 WL 654378 (D. Del. May 10, 2000), supports the exact opposite conclusion. In that case, defendant Dentsply sought an order precluding the United States from using survey information generated under supervision of government experts on the ground that "the United States failed to identify the individuals who provided responses to the survey and to provide the written survey responses as part of its initial disclosures under Fed. R. Civ. P. 26(a)(1)." *Dentsply*, 2000 WL 654378, *1. As explained by the court in reasoning that is equally applicable here:

> [R]equiring initial disclosure of survey responses would undermine the rule that parties are not compelled to disclose materials related to surveys commissioned in anticipation of litigation but not anticipated for use during trial. *See, e.g., Starter Corp.*, 1996 WL 693347 at *1 (denying plaintiff's request for production of documents generated by a survey that defendant commenced but did not intend to offer into evidence at trial); *Locite Corp. v. National Starch & Chemical Corp.*, 516 F.Supp. 190, 205 n. 24 (S.D.N.Y. 1981) ("One should not discourage surveys

[4] Cobb-Vantress apparently misunderstands the plain text of Rule 26(a)(1)(B). Rule 26(a)(1)(B) does not require actual production of documents. Rather, it merely requires "a description by category and location." Fed. R. Civ. P. 26(a)(1)(B).

> for use in litigation, nor should one compel a party who has commissioned such a survey to introduce it at trial if it does not advance his case, particularly where his adversary 'equally . . . [can] commission and offer such a survey." ' (*citing Procter & Gamble Co. v. Johnson & Johnson, Inc.*, 485 F. Supp. 1185, 1201 n. 6 (S.D.N.Y. 1979)); *Karan*, 82 F.R.D. at 685-86 (party not required to disclose survey materials at time when it had not yet decided whether it would use survey at trial) . . . . To construe Rule 26(a)(1) to require parties to make initial disclosures of the survey materials and the identities of survey respondents of surveys commissioned in anticipation of litigation would potentially compel parties to disclose the work of non-testifying experts and surveys that a party does not intend to introduce at trial by requiring disclosure of such information prior to the party's decision. The Court cannot imagine Rule 26(a)(1) was intended to achieve this absurd result. Therefore, disclosure of such materials would not be required until and if the government determined it intended to use the survey at trial. *See Karan*, 82 F.R.D. at 685-86.

Dentsply, 2000 WL 654378, *5 (emphasis added).

2. The cases relied upon by Cobb-Vantress are not on point

Not only does it ignore the plain language of Rule 26, but next Cobb-Vantress proceeds to cite and discuss a string of cases for the purported proposition that "numerous courts have concluded that test data must be produced in environmental litigation and have sanctioned efforts to hide adverse test results" -- all without disclosing the radically different circumstances underlying these rulings. *See* Supp. Br., pp. 10-12. In *In re DuPont–Benlate Litigation*, 918 F.Supp 1524, 1529-48 (M.D. Ga. 1995), the court sanctioned DuPont for failing to produce test results after: (1) those results were requested by the plaintiffs and DuPont promised to produce them; (2) DuPont had agreed to produce the results in return for access to the plaintiffs' land for testing; (3) the court ordered their production and threatened a $500,000 sanction for failure to comply with discovery obligations; (4) DuPont's expert testified based upon summaries of the data without disclosing the underlying data and misrepresented the data in his testimony; and (5) the plaintiffs demonstrated a "substantial need" for the data and DuPont never put the data on any privilege log. None of the conditions that contributed to a finding that DuPont had

defrauded the court and the plaintiffs is present in the case before this Court. Significantly, the *DuPont-Benlate* court noted that "DuPont in fact waived its claim of work product protection to all information and documents related to test results which would be used in defense of the litigation." 918 F.Supp. at 1548. Such is not the case here.

Likewise, *Malautea v. Suzuki Motor Corp.*, 148 F.R.D. 362, 374-75 (S.D. Ga. 1991), does not inform the question presently before the Court. In *Malautea*, the court sanctioned the defendant and its counsel for failing to produce information about automobile design and marketing after being repeatedly ordered to do so by the court. The *Malautea* court had ordered production of routine information of the sort the State has already produced to the poultry integrator defendants in this matter, and not documents or information developed in anticipation of litigation of the sort which is subject to the State's claims of work product protection.

Finally, in *Anderson v. Cryovac, Inc.*, 862 F.2d 910, 923 (1st Cir. 1988), the court held that failure to disclose or produce documents can constitute "misconduct" within the purview of Fed. R. Civ. P. 60(b)(3). In *Anderson,* the defendant represented it had produced all responsive non-privileged documents, *see* 862 F.2d at 928, but in fact had failed to produce such documents. The case presented no claims of attorney-client privilege or work product protection of the sort that are now before this Court.

3. Other Poultry Integrator Defendants agree that materials such as the ones Cobb-Vantress seeks to compel are protected by the work product doctrine

Cobb-Vantress contends in its Supplemental Brief, p. 9, that "environmental data and test results are non-privileged and discoverable facts." Cobb-Vantress's (and the other Tyson defendants')[5] position, however, is contradicted by the position taken by several other Poultry

[5] Tyson Foods, Tyson Chicken and Tyson Poultry.

Integrator Defendants. Their responses to the discovery requests served by the State reveal that they agree that materials such as those Cobb-Vantress seeks to compel are protected by the work product doctrine.[6] For example, in response to discovery requests seeking tests or analyses performed on or on behalf of Simmons Foods, Inc. on soils or lands within the IRW, Simmons Foods, Inc. responded as follows: "Simmons objects to this request on the grounds that it seeks documents that, if they exist, are protected by the work-product doctrine as being created by consultants retained specifically with regard to this litigation. . . ." Simmons Foods, Inc.'s Responses to July 10, 2006 Requests for Production of Documents Propounded by Plaintiffs, Response No. 120 (Attached as Ex. 1). Cargill, Inc. asserted a similar privilege claim to these document requests, "Cargill, Inc. further objects to this request . . . to the extent that it . . . seeks information protected by the attorney client, work product, or joint defense privileges . . . ." Cargill, Inc.'s Response to State of Oklahoma's July 10, 2006 Set of Requests for Production to Cargill, Inc., Response Nos. 120-23 (Attached as Ex. 2). And although while reserving the right to supplement its response upon resolution of Cobb-Vantress's Motion to Compel, Peterson Farms, Inc. similarly asserted a privilege claim: "Peterson Farms objects to this request as it includes documents within its scope which are protected from disclosure, *see* General Objection No. 3 [. . . the 'work product' doctrine; the 'trial preparation doctrine' . . .]." Responses of Defendant, Peterson Farms, Inc. to State of Oklahoma's July 10, 2006 Set of Requests for

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[6] Cobb-Vantress's own response to similar discovery requests recognizes the potential validity of the State's position. Cobb-Vantress responded, "Plaintiff has refused to produce documents in response to substantially similar requests issued by Cobb-Vantress. Cobb will supplement this response upon the final disposition of Cobb-Vantress' Motion to Compel. Until such final disposition of the Cobb-Vantress Motion to Compel, Cobb reserves any and all objections, privileges and protections otherwise available to Cobb with respect to this request." Cobb-Vantress, Inc.'s Responses to State of Oklahoma's July 10, 2006 Set of Requests for Production, Response Nos. 120-123 (Attached as Ex. 5).

Production, Response Nos. 120-23 (Attached as Ex. 3); *see also* similar response in Responses of Defendants, George's, Inc., and George's Farms, Inc., to Plaintiffs' July 10, 2006 Requests for Production of Documents, Response Nos. 120-123 (Attached as Ex. 4). Simply put, Simmons, Cargill, Peterson and George's are asserting the same work product claim as the State.

B. The Supplemental Brief is an Unfounded and Improper Effort to Impugn the Integrity of the State

In its Supplemental Brief, Cobb-Vantress strings together a line of unfounded and improper attacks that have absolutely nothing to do with whether the sampling information at issue in its Motion to Compel is protected as work product. The only apparent reason for such attacks would be to (undeservedly) cast the State in a bad light.[7]

1. The State has adequate evidentiary support for the allegations set forth in the State's First Amended Complaint

Although having absolutely no bearing on the merits of the issue before the Court, Cobb-Vantress suggests that the State filed its lawsuit against the poultry integrators without adequate evidentiary support.[8] *See* Supp. Br., pp. 2 & 5. In fact, ample evidentiary support exists supporting the allegations set forth in the State's First Amended Complaint. *See, e.g.,* Plaintiff State of Oklahoma's Reply to "Defendants' Response and Objection to Plaintiff's Motion for Leave to Expedite Discovery" [DKT #232]. Additionally, in response to several interrogatories propounded by the poultry integrator defendants, the State provided evidentiary support

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[7] *See, e.g., Pancoast v. Eldridge*, 259 P. 863 (Okla. 1927) ("'A brief in no case can be used as a vehicle for the conveyance of hatred, contempt, insult, disrespect, or professional discourtesy of any nature for the court of review, the trial judge, or opposing counsel'") (citation omitted).

[8] On several occasions in the Supplemental Brief, Cobb-Vantress incorrectly tries to characterize the State's lawsuit as one based solely upon human health issues. This characterization is incomplete. A review of the State's First Amended Complaint clearly reveals that the lawsuit is based upon numerous environmental and natural resource damage concerns, as well as human health concerns.

concerning the following: elevated levels of arsenic; elevated levels of hormones; elevated levels of microbial pathogens; contamination of water; contamination of soil; contamination of biota; and imminent and substantial endangerment to human health. Cobb-Vantress's contention that there is "a complete absence of even a good faith basis for this lawsuit" defies rational thinking.

2. The State has not evaded or circumvented the discovery rules

Again, although having absolutely no bearing on the merits of the issue before the Court, Cobb-Vantress attempts to suggest that the State sought to evade or circumvent the discovery rules. It is outrageous to suggest that the State sought to delay the Rule 26(f) conference in order to "surreptitiously gather[] the evidence [it] should have had when [it] filed this lawsuit." *See* Supp. Br., p. 3. Prior to the filing of the State's lawsuit there already existed sufficient evidence to support the filing of a complaint alleging that poultry waste was adversely affecting the Illinois River Watershed.[9] Indeed, prior to the filing of the State's lawsuit, the poultry industry had admitted in its advertisements that poultry waste is a source of nutrients affecting the IRW.[10] Nor was the delay in the Rule 26(f) conference a pretext to avoid this Court's authority to supervise discovery. *See* Supp. Br., p. 4. The fact of the matter is that the State conducted pre-filing and post-filing investigations prior to the Rule 26(f) conference that did not require the use of formal discovery tools, and when such tools were appropriate the State came to the Court with its expedited motion. *See* Docket # 210.

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[9] *See, e.g.,* State's Rule 26(a) Disclosure.

[10] *See* Exhibit 6 (Sept. 10, 2004 *Tulsa World* ad stating: "Our Scenic River Watersheds are examples of environments that include many sources of nutrients that potentially impact the health of the rivers and streams that lie within them. We are prepared to do our part to take care of the poultry portions of the nutrient equation. . ."); Exhibit 7 (Dec. 5, 2004 *Tulsa World* ad stating: "Lately, a good deal of concern has been raised about the effects of excess nutrients in the land and waters of Eastern Oklahoma. So where do these nutrients come from? Nutrients can come from many sources, one of which is the use of poultry litter as an organic fertilizer. . .").

Cobb-Vantress also tries to find fault with the Oklahoma Department of Agriculture, Food and Forestry's ("ODAFF") issuance of administrative warrants to conduct sampling. Cobb-Vantress totally ignores the fact that ODAFF's request for the issuance of such warrants and the conduct of such sampling was (and is) fully within its statutory authority.[11] Cobb-Vantress's efforts to ascribe improper motives is therefore wholly without justification or merit.

Finally, citing merely to unsubstantiated allegations of a poultry grower in a newspaper article, Cobb-Vantress asserts that the State has "trespassed on private property in Arkansas and lands owned by the State of Arkansas" in the course of its sampling activities. *See* Supp. Br., pp. 3-4. These allegations are obviously disputed, plainly do not involve Cobb-Vantress, and in any event need not be resolved here. Such allegations are utterly irrelevant to the issues raised in the Motion to Compel.

3. The State's Rule 26(a) disclosure and supplementation fully comply with the Federal Rules

Yet again, although having absolutely no bearing on the merits of the issue before the Court, Cobb-Vantress attempts to suggest that the State's Rule 26(a) disclosure was deficient. The fact of the matter is that the State's Rule 26(a) disclosure was a comprehensive description by category of documents the State may use to support its claim. That the number of documents is voluminous should come as no surprise to the poultry integrator defendants, including Cobb-Vantress, given the size, scope and complexity of the case. In fact, just recently poultry integrator defendant Peterson Farms, Inc. served comprehensive discovery on the State which covers many of the categories of documents described by the State in its Rule 26(a) disclosure.

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[11] *See* Oklahoma Constitution, Art. 6, § 31; 2 Okla. Stat. § 2-14; 2 Okla. Stat. § 2-4(A)(7) & (16); 2 Okla. Stat. § 9-10(A)(2)(a); 2 Okla. Stat. § 10-9.10; 2 Okla. Stat. § 10-9.20; 27A Okla. Stat. § 1-3-101(D)(1)(a) & (h).

This fact demonstrates that the categories of documents designated by the State reflect a high degree of relevancy and go to the factual basis of the State's lawsuit.

4. The State will disclose all evidence required under the Federal Rules

Finally, although having absolutely no bearing on the merits of the issue before the Court, Cobb-Vantress suggests the State is improperly attempting to "conceal" evidence.[12] Cobb-Vantress's position reflects a willful ignorance of what Fed. R. Civ. P. 26(a)(2), (b)(3) and (b)(4) require. The State will fully comply with its obligations under the Federal Rules, and any suggestion to the contrary is entirely without foundation.[13]

II. CONCLUSION

For all of the above reasons set forth in its briefing and oral argument on this issue, the State of Oklahoma respectfully requests the Court to deny Defendant Cobb-Vantress, Inc.'s Motion to Compel.

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[12] Cobb-Vantress's assertions of misconduct based upon the unsubstantiated words of a disgruntled former employee of the Office of the Attorney General who is involved in an employment lawsuit against that Office, *see* Supp. Br., p. 8, is nothing more than an unbecoming attempt by Cobb-Vantress to distract attention from the real issues at hand. These assertions are far afield of anything remotely relevant to the Motion to Compel.

[13] Cobb Vantress attempts to put a nefarious spin on Mr. Nance's comments during the August 10, 2006 hearing. Mr. Nance's comments are fully consistent with Rule 26. *See* Fed. R. Civ. P. 26(a)(2)(B) ("The [expert] report shall contain a complete statement of . . . the data or other information considered by the witness in forming the opinions . . .") (emphasis added); *see also* Fed. R. Civ. P. 26(b)(3) (a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. . .").

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